

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LUV N' CARE, LTD. and
ADMAR INTERNATIONAL, INC.,

Plaintiffs/Counterclaim
Defendants,

v.

MAYBORN USA, INC.

Defendant/Counterclaim
Plaintiff.

Civil Action No. 11-CV-2460 (SAS)

(JURY TRIAL DEMANDED)

**DECLARATION OF BENJAMIN H. GRAF IN OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

I, Benjamin H. Graf, declare the following under penalty of perjury:

1. I am an associate at the firm Goldberg Cohen LLP, current counsel to Plaintiffs in the above-captioned action.
2. I submit this declaration in opposition to Defendant Mayborn USA, Inc.'s February 27, 2012 motion for summary judgment.
3. Attached as Exhibit 1 to this Declaration is a demonstrative exhibit containing: five (5) pages of photographic images showing various views of the Luv n' care, Ltd. ("LNC") gripper cup top trade dress (left side) side-by-side the corresponding view of the accused Mayborn USA, Inc. ("Mayborn") cup top (right side) at issue in this lawsuit; an additional five (5) pages with photographic images showing various views of the accused Mayborn cup top (right side) side-by-side figures or portions of figures taken from U.S. Patent No. D634,439 (the "D439 patent") (left side); and an additional five (5) pages with various views showing a three-way comparison between figures taken from Japanese

Patent JP D129061 (left side) side-by-side figures taken from the D439 patent (middle) and photographic images of the accused Mayborn cup top (right side).

4. Attached as Exhibit 2 to this Declaration is a true and correct copy of excerpts from the transcript of the telephonic conference held in the above-captioned action on November 14, 2011 at 3:10 p.m.
5. Attached as Exhibit 3 to this Declaration is a demonstrative exhibit showing numerous alternative designs for children's sippy cup tops. The top-left photographic image on page 1 of this exhibit was taken from a webpage on March 19, 2012 having this URL:
https://www.google.com/search?q=playtex+sippy+cups&hl=en&client=firefox-a&hs=ZwR&rls=org.mozilla:en-US:official&prmd=imvns&source=lnms&tbm=isch&ei=TLlnT86xAqHh0wG10aSeCQ&sa=X&oi=mode_link&ct=mode&cd=2&ved=0CFsQ_AUoAQ&biw=1245&bih=687; the top-right image on page 1 of this exhibit is a photograph taken by the undersigned on March 15, 2012 of a GERBER® brand product; the remaining photographic images throughout this exhibit were taken from a webpage on March 19, 2012 having this URL:
https://www.google.com/search?q=sippy+cups&hl=en&client=firefox-a&hs=Xmf&rls=org.mozilla:en-US:official&prmd=imvns&source=lnms&tbm=isch&ei=xVJnT6bVEon30gGIuuWVCA&sa=X&oi=mode_link&ct=mode&cd=2&ved=0CF8Q_AUoAQ&biw=1081&bih=716. Exhibit 3 also contains various figures taken from U.S. patents and international patent applications.

6. In some of the patent figures provided in Exhibit 3, reference numerals and reference lines have been removed for clarity; in addition, arrows have been added to the figures on pages 11 and 12 of Exhibit 3 to indicate air valves or air vents.
7. Attached as Exhibit 4 to this Declaration is a true and correct copy of relevant excerpts of U.S. Patent No. 6,994,225, with page numbers added in the lower right-hand corner of the pages for ease of reference.
8. Attached as Exhibit 5 to this Declaration is a true and correct copy of relevant excerpts from the file wrapper of U.S. Patent No. D634,439, with page numbers added in the lower right-hand corner of the pages for ease of reference.
9. Attached as Exhibit 6 to this Declaration is a true and correct copy of an email produced in the related case of *Luv n' care, Ltd. v. Jackel International Limited*, Docket No. 10-1891, Parish of Ouachita, Fourth Judicial District Court of the State of Louisiana, sent from Tina Gray to Martin Cooke on June 23, 2009. Exhibit 6 contains confidential-attorneys' eyes only information and is being filed in redacted form. Courtesy copies for the Court and opposing counsel are being provided in unredacted form.
10. Attached as Exhibit 7 to this Declaration is a true and correct copy of excerpts from the deposition transcript of deponent Ilan Samson taken on July 26, 2011 in the related case of *Luv n' care, Ltd. v. Jackel International Limited*, Docket No. 10-1891, Parish of Ouachita, Fourth Judicial District Court of the State of Louisiana.
11. Attached as Exhibit 8 to this Declaration is a true and correct copy of an email produced in the related case of *Luv n' care, Ltd. v. Jackel International Limited*, Docket No. 10-1891, Parish of Ouachita, Fourth Judicial District Court of the State of Louisiana, sent from Martin Cooke to Tina Gray on February 3, 2010. Exhibit 8 contains confidential-

attorneys' eyes only information and is being filed in redacted form. Courtesy copies for the Court and opposing counsel are being provided in unredacted form.

12. Attached as Exhibit 9 to this Declaration is a true and correct copy of excerpts from the deposition transcripts of deponent Arnold Rees, taken on September 15, 2011 and February 23, 2012, respectively, in the related case of *Luv n' care, Ltd. v. Jackel International Limited*, Docket No. 10-1891, Parish of Ouachita, Fourth Judicial District Court of the State of Louisiana.
13. Attached as Exhibit 10 to this Declaration is a true and correct copy of excerpts from the deposition transcript of deponent Nick Cudworth taken on June 24, 2011 in the related case of *Luv n' care, Ltd. v. Jackel International Limited*, Docket No. 10-1891, Parish of Ouachita, Fourth Judicial District Court of the State of Louisiana.
14. Attached as Exhibit 11 to this Declaration is a true and correct copy of excerpts from the report and amendment to the report of Plaintiffs' design patent expert Cooper Woodring, previously produced in this litigation.
15. Attached as Exhibit 12 to this Declaration is a true and correct copy of excerpts from the deposition transcript of deponent Nathan Shamosh taken on February 2, 2012 in connection with this case. Exhibit 12 contains confidential-attorneys' eyes only information and is being filed in redacted form. Courtesy copies for the Court and opposing counsel are being provided in unredacted form.
16. Attached as Exhibit 13 to this Declaration is a true and correct copy of excerpts from the deposition transcript of deponent Nouri E. Hakim taken on February 16, 2012 in connection with this case.

17. U.S. Patent Application 29/358,241, which became the ‘439 Patent, was filed on March 24, 2010 while a parent application, U.S. Patent Application No. 10/536,106 (the “‘106 Application”), was still pending.

18. The ‘106 Application is still pending as of today’s date.

19. A declaration of Nouri E. Hakim containing confidential-attorneys’ eyes only information, along with two further exhibits attached thereto, is also being filed under seal in connection with Plaintiffs’ opposition to Defendant’s motion for summary judgment.

20. I hereby certify and affirm that all of the facts herein are true based upon my personal knowledge, or are believed to be true to the best of my knowledge, and certify the truth of these statements under penalty of perjury.

Dated: March 20, 2012

/s/ Benjamin H. Graf
Benjamin H. Graf